

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

Karen A. Vovk,

Complainant, ORDER REGARDING RELEASE
OF DEPARTMENT OF HUMAN
V. RIGHTS
RIGHTS CASE FILE

Tom Thumb Food and Market,

Respondent.

The above-captioned matter is pending before the undersigned Administrative Law Judge under a Notice of and Order for Hearing dated April 2, 1990. The Respondent, by its attorney, James M. Hamilton, Hertogs Fluegel Sieben Polk Jones & LaVerdiere, 999 Westview Drive, Hastings, Minnesota 55033, has requested that the Administrative Law Judge issue an order authorizing the release of the Minnesota Department of Human Rights case file pertaining to the Complainant's charge against the Respondent. The Respondent submitted a proposed order with its request. On June 12, 1990, the Complainant, by her attorney, James G. Ryan, Mavity & Ryan, 426 Parkdale Plaza, 1660 South Highway 100, Minneapolis, Minnesota 55416, notified the Administrative Law Judge that she had no objection to the proposed order.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED:

(1) The Minnesota Department of Human Rights shall produce for inspection by Complainant Karen A. Vovk and her attorney, James G. Ryan, and Respondent Tom Thumb Food Markets, Inc., and its attorney, James M. Hamilton, within ten days of the date of this Order all purely factual material contained in the charge file pertaining to Karen A. Vovk's charge of sex discrimination and reprisal against Tom Thumb Food and Market (Case Number E18648-RSS/RP5-1S, filed on March 27, 1989).

(2) Intra-agency documents containing recommendations, evaluations, conclusions, mental impressions, or legal theories of the Commissioner and his employees and delegates, and other documents that the Department claims are privileged, may be withheld by the Department pending further order of the

undersigned Administrative Law Judge. Where such documents also contain factual information, the factual material shall be disclosed if it can reasonably be separated without compromising the remaining portions of the document.

(3) The Department of Human Rights shall provide the parties with a log identifying documents (or portions of documents) withheld from the parties' inspection within ten days of the date of this Order. The log will include, where applicable, the date of the document, the names and business addresses of the author and addressee of the document, the nature or purpose of the document, and the reason why the document (or portion thereof) was withheld.

Dated this day of June, 1990.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The proposed order submitted by the Respondent would have required the Minnesota Department of Human Rights to release numerous documents contained in the Complainant's charge file, including drafts of the initial information request and the charge, the charging party's completed Employment Discrimination Questionnaire and Data Practices Notice, intake notes from the charging party's initial contact with the Department, letters from the charging party's attorney, the Department's analysis of information supplied by the Respondent relating to inventory and terminations, memoranda by the Departmental investigator summarizing evidence in the file and making recommendations for disposition of the charge, and the investigation log. The Respondent's proposed order would permit the Department to withhold from the parties only "internal memoranda of a procedural nature which do not contain factual information pertaining to the issues underlying the claims of discrimination in this matter." Although the Complainant has no objection to the proposed order submitted by the Respondent, the Department of Human Rights is not a party to this proceeding and presumably is not aware of the parameters of the requested order.

The Administrative Law Judge has concluded that it is appropriate to issue a modified order that guards against the unwarranted disclosure of privileged and confidential materials that may be contained in the case file. The rules of the Office of Administrative Hearings pertaining to contested case hearings generally permit "[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota," with the express proviso that, "[i]n ruling on a discovery motion, the judge shall recognize all

privileges recognized at law." Minn. Rules pt. 1400.6700, subp. 2. Rule 26.02(1) of the Minnesota Rules of Civil Procedure similarly prohibits discovery of privileged matter. Privileges recognized in the context of discovery are the same as those set forth in Rule 501 of the Minnesota Rules

of Evidence, and include the attorney-client privilege, the work product doctrine, and the privilege for governmental communications. See Herr & Haydock, Minnesota Practice 26.7 (1985), and Thompson, Minnesota Practice, Evidence 501.04, .05, and .08 (1979).

The Department may be able to assert a privilege with respect to numerous documents that may be contained in the Complainant's charge file. The attorney-client and work product privileges protect confidential communications made in the course of an attorney-client relationship and materials prepared by or for the Department in anticipation of litigation. The governmental communications privilege protects confidential communications made to public officers from disclosure if "the public interest would suffer by the disclosure." This privilege also encompasses an "informer's privilege" which permits the State to protect the identity of individuals who have provided information regarding violations of law. Id. at 501.08; see also Minn. Stat. 595.02, subd. 1(e).

In addition, an agency or "executive" privilege frequently has been applied in proceedings involving discovery of agency records to shield advisory opinions, recommendations and deliberations rendered in the course of performing decision-making functions. See 8 Wright & Miller, Federal Practice and Procedure 2019 (1970). This privilege has been recognized as a basis for precluding the discovery of certain documents sought in analogous litigation arising under federal civil rights laws. For example, in *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. 1981), the defendant in an employment discrimination action sought discovery of all records relating to any discrimination charge filed by the plaintiff. The federal Equal Employment Opportunity Commission withheld information relating to charges filed by the plaintiff against other employers, non-factual materials relating to the EEOC's conciliation efforts, and intra-agency memoranda, reports and recommendations. The U.S. Court of Appeals for the Fifth Circuit held that intra-agency memoranda, reports of agents, subordinate staff evaluations, and advisory recommendations were shielded by an official or executive privilege because disclosure would be harmful to governmental interests. The Court emphasized that "[g]overnment officials would hesitate to offer their candid and conscientious opinions to superiors or co-workers if they knew that their opinions of the moment might be made a matter of public record at some future date." Id. at 882. The Court did conclude, however, that it was appropriate to permit discovery of purely factual material related to the merits of the

discrimination charge, including factual material reflected in the otherwise protected documents and factual material gleaned during conciliation efforts.

Because the rules of the Office of Administrative Hearings and the Minnesota Rules of Civil Procedure protect against the discovery of privileged information unless a further showing of need is made, the Administrative Law Judge has determined that the Department should be permitted to withhold at this stage of the proceedings documents that it deems privileged, including, if applicable, intra-agency documents containing recommendations, evaluations, conclusions, mental impressions, or legal theories of the Commissioner and his employees and delegates. The Department will be required to provide the

parties with an identification of the documents withheld. The parties will, of course, remain free to bring an appropriate motion in the event that they determine that the information withheld by the Department is not privileged or is needed for the proper presentation of their cases.

B.L.N.